No. 98-1435

Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES

RANDALL A. TERRY, *et al.*,
Petitioners,

v.

NEW YORK STATE NATIONAL
ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Because Petitioners' statement of the questions presented does not adequately reflect the proceedings below, Respondents offer the following counter-statement of the questions presented.

1. Respondents obtained final judgment on their 42 U.S.C. § 1985(3) claims nearly ten years ago. *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) ("*Terry I*"). Since that time, Petitioners have repeatedly argued that this Court's later decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), compelled both a reversal of *Terry I* and a denial of prevailing party attorneys' fees under 42 U.S.C. § 1988. However, *Bray*'s subsequent change in the law could have no effect on the finality of *Terry I*, and this Court, after first remanding for reconsideration in light of *Bray*, *see Pearson v. Planned Parenthood*, 507 U.S. 901 (1993), effectively ignored Petitioners' later request to grant *certiorari* based on *Bray*, and instead remanded on other grounds. *Id.*, 512 U.S. 1249 (1994). Accordingly, the question with respect to § 1988 attorneys' fees is:

   > Whether the Court of Appeals correctly found that (a) Respondents' status as "prevailing parties" on their § 1985(3) claims is unaffected by the subsequent decision in *Bray*, (b) as prevailing parties, Respondents are presumptively entitled to attorneys' fees under 42 U.S.C. § 1988, unless Petitioners show special circumstances that would make such an award unjust, and (c) the District Court properly exercised its discretion in holding that Petitioners failed to show that an award of attorneys' fees pursuant to 42 U.S.C. § 1988 would be unjust?

Respondents submit that the Court of Appeals properly stated and applied the law, and accordingly that *certiorari* should be denied.

2. In *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994) ("*Bagwell*"), this Court noted that, where a contemnor is given an opportunity to purge the contempt, the proceeding is civil, not criminal. 512 U.S. at 828. *Bagwell* also noted with approval the decision in *United States v. United Mine Workers*, 330 U.S. 258 (1947) ("*United Mine Workers*"), in which this Court fashioned a limited, discrete purge provision designed to coerce compliance with an injunction prohibiting future conduct. In the present case, the District Court used a purge provision that, like the one in *United Mine Workers*, sought to coerce both Petitioners and their supporters to comply with the permanent injunction. Nonetheless, Petitioners contend that the purge provision serves no coercive purpose, and instead seeks to extract an "acknowledgment of wrongdoing" comparable to the order that was struck down in *In re E.I. DuPont de Nemours & Co.*, 99 F.3d 363 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 263 (1997). Accordingly, the question is:

> Whether a contempt order that requires Petitioners, as a condition of purging themselves of contempt, to (a) acknowledge that they have agreed to comply with the terms of the injunction, and (b) publicize that acknowledgment in a manner reasonably calculated to reach the persons to whom Petitioners had previously publicized clinic blockades, is a coercive civil sanction or a criminal punishment, where the order does not require an acknowledgment of wrongdoing, and otherwise leaves Petitioners free to express their views regarding the injunction and the contempt order itself?

Respondents submit that the decision below does not conflict in any way with either *Bagwell* or *DuPont*, and that accordingly *certiorari* should be denied.

LIST OF PARTIES

Respondents accept Petitioners' list of the parties, with one exception: Petitioners' list fails to include as a Respondent the New York City Chapter of the National Organization for Women. In accordance with Rule 29.6 of the Rules of this Court, Respondents state that New York State National Organization for Women, New York City Chapter of the National Organization for Women, National Organization for Women, New York State National Abortion Rights Action League, Inc., Planned Parenthood of New York City, Inc., and Eastern Women's Center, Inc. are corporations. The New York State National Organization for Women and the New York City Chapter of the National Organization for Women are affiliated with the National Organization for Women. The New York State National Abortion Rights Action League, Inc. is affiliated with the National Abortion Rights Action League, Inc. Planned Parenthood of New York City, Inc. is affiliated with Planned Parenthood Federation of America, Inc., and owns and operates Planned Parenthood Clinic (Bronx), Planned Parenthood Clinic (Brooklyn), and Planned Parenthood Margaret Sanger Clinic (Manhattan).

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COUNTER-STATEMENT OF THE CASE

Respondents do not adopt Petitioners' statement of the case.

Although the present petition arises out of collateral, post-judgment proceedings, a review of the underlying judgment is necessary in order properly to frame the issues raised by the Petition. Respondents brought this action at a time when Petitioners were threatening mass blockades of abortion clinics in the New York metropolitan area. The state and federal courts below gave Respondents temporary injunctive relief, barring Petitioners from blocking access to clinics. Nonetheless, Petitioners repeatedly blockaded abortion clinics in violation of the injunctions,[1] and organized hundreds of supporters to do so. On numerous occasions, clinics were shut, and police were required to make hundreds of arrests to restore access to clinics.

When the District Court held blockade leaders Randall Terry and Operation Rescue in contempt, Petitioners organized more blockades and continued to violate the injunctions. Finally, the District Court granted summary judgment for Respondents, and issued a permanent injunction barring Petitioners from blockading clinics. Petitioners exhausted all avenues of appeal from the grant of summary judgment; as a result, that ruling is final and is not presently before this Court.

After the District Court granted summary judgment, Respondents moved to have Petitioners held in contempt for their repeated clinic blockades. At approximately the same time, Respondents, having prevailed on their claims under 42 U.S.C. § 1985(3), sought attorneys' fees pursuant to

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[1] Between April, 1988 and January, 1989, the courts below issued a temporary restraining order, converted that order to a preliminary injunction, and finally issued a permanent injunction. These orders are referred to collectively herein as the "injunctions."

42 U.S.C. § 1988. The District Court granted both requests. In an effort to escape any consequences of their contumacious conduct and their violations of Respondents' rights, Petitioners embarked on a multi-year process of appeals that is only now drawing to a conclusion. Put simply, Petitioners contend that (1) the Court of Appeals should have applied this Court's ruling in *Bray* on the motion for attorneys' fees pursuant to 42 U.S.C. § 1988, and (2) the Court of Appeals improperly approved a "purge" provision that serves no purpose other than to punish Petitioners.

With respect to the § 1988 attorneys' fee awards, Petitioners' argument ignores the fact that *Bray*, which was decided three years after the underlying judgment became final, can have no impact on Respondents' status as prevailing parties. Accordingly, *Bray* is only relevant, if at all, to the question whether, in light of its holding, the courts below could fairly award attorneys' fees. However, having asked the courts below to consider changes in the law subsequent to the decision in *Terry I*, Petitioners cannot complain if those courts also took into account developments subsequent to *Bray*, and specifically the passage of the Freedom of Access to Clinics Act ("FACE"), 18 U.S.C. § 248 (1994), which Congress specifically intended to fill the gap left by *Bray*. Petitioners' suggestion that this amounted to an unconstitutional *ex post facto* application of the statute is baseless; the District Court simply concluded, after consideration of *all* relevant information, that Petitioners had failed to show that an award of prevailing party attorneys' fees would be unjust. This was an equitable determination, not a finding of liability under FACE, and accordingly provides no basis to grant *certiorari*.

Petitioners' challenge to the purge provision adopted by the District Court is equally flawed. Petitioners ignore the fact that they are still obligated to comply with the permanent injunction, that they have *never* agreed to do so, and that the record strongly supports the conclusion that the only reason Petitioners ceased their mass blockades was because of the sanctions imposed by the District Court. Accordingly, it was well within the District Court's discretion to conclude that

obtaining a pledge of future compliance would serve a legitimate coercive purpose, both as to Petitioners and their supporters. Petitioners' attempt to compare the purge provision with the one struck down in *DuPont* is doubly flawed. Unlike this case, the lower court in *DuPont* imposed sanctions after the case was dismissed with prejudice, leaving no meaningful way of complying with the court's order; here, by comparison, Petitioners still have the opportunity to comply with the ongoing requirements of the permanent injunction. Moreover, the lower court in *DuPont* specifically sought to extract a confession of wrongdoing, something that is entirely lacking from the purge provision in this case. In short, there is no conflict between this case and *DuPont*, and the purge provision provides no basis on which to grant *certiorari*.

Before turning to a more detailed discussion of the facts, Respondents wish to clarify one point. The Petition does not raise any genuine First Amendment issues. The District Court's injunctions prohibited Petitioners from blockading clinics. The injunctions did not, however, bar Petitioners from exercising their First Amendment rights to engage in peaceful, non-violent protests; on the contrary, every version of the injunctions preserved Petitioners' First Amendment rights. Petitioners' suggestions notwithstanding, the conduct for which they were sanctioned had nothing to do with "peaceful and non-violent public demonstrations." (Petition at 4.) Rather, as the decisions below make clear, Petitioners were sanctioned for repeatedly blockading clinics, in express violation of the injunctions. This is not activity that is protected under the First Amendment.

STATEMENT OF THE FACTS AND PROCEDURAL POSTURE

A. Events And Proceedings Leading To The Grant Of Summary Judgment And The Issuance Of A Permanent Injunction

Respondents commenced this action in the Supreme Court of New York on April 25, 1988, seeking declaratory and injunctive relief in order to restrain Petitioners from staging mass blockades at women's reproductive health care facilities that were planned for April 30, 1988 through May 7, 1988 in the New York metropolitan area. (A 3a.)[2] The complaint alleged violations of New York State and City civil rights laws, common-law torts, and conspiracy to deny women seeking abortions or family planning services the equal protection of the laws and equal privileges and immunities, in violation of 42 U.S.C. § 1985(3). (A 3a.)

Justice Cahn, to whom the case was assigned, issued a temporary restraining order on April 28, 1988 (the "TRO"), which, in its initial form, did not expressly prohibit the blocking of access to clinics. (A 3a.) On May 2, 1988, 503 Operation Rescue protestors blockaded a Manhattan abortion clinic; all 503 were arrested. (A 29a.) That afternoon, Justice Cahn modified the TRO, enjoining Petitioners from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester Counties." (A 4a.) The following day, Petitioner Terry led hundreds of protestors in blockading another clinic; once again, several

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[2] The facts stated herein are drawn primarily from the decision of the Court of Appeals from which a writ of *certiorari* is sought, and the decision of the District Court reinstating contempt sanctions and awarding attorneys' fees. Both decisions are contained in Petitioners' Appendix to their Petition for a Writ of Certiorari, which is cited herein as "A __."

hundred blockaders were arrested. (A 30a.) That afternoon, Petitioners removed the action to Federal Court. (A 4a.)

On May 4, 1988, the District Court continued Justice Cahn's TRO, adding to it a provision imposing coercive sanctions of $25,000 for each day that Petitioners violated the order. (A 30a.) Nonetheless, on May 5th and 6th, Petitioners again conducted massive blockades at abortion clinics. The May 5th blockade lasted several hours, and the May 6th blockade led to hundreds of arrests. (*Id.*)

In light of Petitioners' repeated violations of the TRO, Respondents moved for an order holding Petitioners Terry and Operation Rescue in civil contempt. The District Court granted the motion on October 27, 1988, imposing $50,000 in contempt sanctions jointly and severally against both Petitioners. *New York State NOW v. Terry*, 697 F. Supp. 1324, 1338 (S.D.N.Y. 1988). At the same time, the District Court granted Respondents' request to convert the TRO to a preliminary injunction and extend it to apply to blockades planned for October 28, 29, and 31, 1988. (A 4a.)

Notwithstanding the injunction, Petitioners blockaded clinics in Dobbs Ferry, New York, and Deer Park, New York on October 29, 1988. At Dobbs Ferry, 250 Operation Rescue protestors blocked ingress to and egress from the clinic for several hours. At Deer Park, 130 people were arrested for blocking access to the clinic. (A 31a.)

After the District Court issued its October 27 Order granting contempt sanctions and a preliminary injunction, Operation Rescue announced plans to conduct further blockades from January 12 through January 14, 1989. (A 32a.) Thereafter, Respondents moved for summary judgment and a permanent injunction. (A 5a.) On January 10, 1989, the District Court granted summary judgment for Respondents on their § 1985(3) claim, and issued a permanent injunction prohibiting Petitioners from

> trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are

> performed in the City of New York, Nassau, Suffolk, or Westchester counties [and] physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties.

Terry I, 704 F. Supp. at 1263. The District Court's order also provided for the doubling of sanctions for successive violations. (*Id.*) Three days later, Petitioners violated the permanent injunction by blockading clinics on January 13 and 14, 1989. Once again, hundreds of blockaders were arrested. (*New York State NOW v. Terry*, 732 F. Supp. at 395; A 34a-35a.)

The Court of Appeals affirmed the District Court's grant of summary judgment, issuance of a permanent injunction, and contempt sanctions against Petitioners Terry and Operation Rescue on September 20, 1989. *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989). This Court denied *certiorari*. That final decision is reported as *New York State NOW v. Terry*, 697 F. Supp. 1324 (S.D.N.Y. 1988) (civil contempt), and *id.*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (summary judgment), *appeals consolidated and aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). The proceedings from the outset of the case to the denial of *certiorari* with respect to the final judgment are referred to herein as *Terry I*.

B. Post-Judgment Collateral Proceedings For Contempt and For Attorneys' Fees

Terry II and Pearson I

On June 9, 1989, Respondents moved in the District Court for an order holding Petitioners in contempt, based on Petitioners' violations of the injunctions on May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. Petitioner Robert Pearson contested Respondents' factual allegations; the other Petitioners did not. *New York State*

NOW v. Terry, 732 F. Supp. 388, 396 (S.D.N.Y. 1990). After a hearing, the District Court granted Respondents' motion as to all Petitioners on February 27, 1990, and imposed contempt sanctions against Petitioners in amounts ranging from $25,000 to $100,000, depending on the number of violations involved. *Id.*, 732 F. Supp. at 399-402. The District Court further held that, as a result of Petitioners' intentional violations of the Court's injunctions, Respondents were entitled to attorneys' fees and costs as compensation for the expenses of bringing the motion for contempt. *Id.*, 732 F. Supp. at 409. The amount of fees to be awarded was left for determination at a later date. *Id.* at 414.

On December 6, 1989, Respondents moved for an award of attorneys' fees under 42 U.S.C. § 1988, as prevailing parties on their claims under 42 U.S.C. § 1985(3). The District Court granted Respondents' motion on May 31, 1990, 737 F. Supp. 1350 (S.D.N.Y. 1990), holding Petitioners jointly and severally liable for a total of $153,211.50 in attorneys' fees and $4,294.31 in costs. At the same time, the District Court approved Respondents' application for attorneys' fees for bringing the motion for contempt. These fee awards ranged from $3,190.02 to $12,542.05, depending on the number of violations committed by each Petitioner; the total of the contempt-based attorneys' fees assessed against the Petitioners was $57,556.78. 737 F. Supp. 1350, 1367 (1990).[3]

On appeal, the Court of Appeals for the Second Circuit affirmed the imposition of contempt sanctions, but modified the District Court's order to make the sanctions payable to the Court rather than to Respondents. The Court of Appeals also affirmed the District Court's award of attorneys' fees under 42 U.S.C. § 1988, as well as the award of attorneys' fees for

[3] The table of fee awards included at page 1367 of the District Court's opinion includes awards against persons not named as Petitioners in the present Petition.

prevailing on the motion for contempt. 961 F.2d 390 (2d Cir. 1992).

Petitioners thereafter filed a petition for a writ of *certiorari*, on the basis of this Court's grant of *certiorari* in *Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119 (1991). On January 13, 1993, this Court determined that the Respondents in *Bray* had failed to state a claim under the first clause of 42 U.S.C. § 1985(3), the same provision on which Respondents' final judgment was based. *Bray*, 506 U.S. 263 (1993). Thereafter, this Court granted *certiorari* in the present case, and vacated and remanded for reconsideration in light of *Bray*. *Pearson v. Planned Parenthood*, 507 U.S. 901 (1993).

The District Court's initial grant of post-judgment relief and the affirmance of that relief by the Court of Appeals are referred to herein as "*Terry II.*" In keeping with the terminology used in Petitioners' brief, this Court's remand for reconsideration in light of *Bray* is referred to as *Pearson I.*

Terry III and Pearson II

On remand, Petitioners asked the Second Circuit to reverse both *Terry I* and *Terry II*, purportedly in accordance with this Court's ruling in *Bray*.[4] The Court of Appeals rejected Petitioners' argument. Instead, the court reinstated *Terry II's* judgment awarding attorneys' fees and contempt sanctions, and pointed out to Petitioners that a request for relief from final judgment must be initiated in the District Court. 996 F.2d 1351 (2d Cir. 1993), A 75a, 77a.

Petitioners again filed a petition for a writ of *certiorari*, arguing that the prospective contempt sanctions ordered by the District Court were criminal in nature, and that this case

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[4] Specifically, Petitioners' June 11, 1993 Letter Brief from William P. Harrington and A. Lawrence Washburn to Elaine B. Goldsmith ("Petitioners' Letter Brief"), asked the Court of Appeals to "remand with instructions to dismiss with prejudice all plaintiffs-appellees' § 1985 claims," "vacate the awards of attorneys' fees," and "vacate the contempt judgments." Petitioners' Letter Brief at 8.

presented the same issue as another case then before this Court (ultimately decided *sub nom. International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994) ("*Bagwell*")). Petitioners further argued that this Court's decision in *Bray* required reversal of the judgment in *Terry I*.[5] On June 30, 1994, this Court decided *Bagwell*, holding that unconditional prospective fines were criminal sanctions and could not be imposed in civil contempt proceedings. On the same day, this Court granted *certiorari* in this case and remanded for further consideration in light of *Bagwell*. This Court's order made no reference whatever to Petitioners' request for reversal based upon *Bray*. *Pearson v. Planned Parenthood*, 512 U.S. 1249 (1994).

The Second Circuit's decision on remand for reconsideration in light of *Bray* is referred to herein as "*Terry III*." This Court's remand for reconsideration in light of *Bagwell* is referred to as "*Pearson II*."

Terry IV

On remand, the Second Circuit left *Terry I*'s grant of summary judgment untouched, but vacated the post-judgment relief awarded in *Terry II*. In so doing, the Second Circuit held that, in light of *Bagwell*, the District Court could not impose unconditional prospective fines in a civil contempt proceeding. In addition, although this Court had not made any reference to *Bray* in its second remand order, the Second Circuit directed reconsideration of the award of attorneys' fees under 42 U.S.C. § 1988 in light of *Bray*. 41 F.3d 794, 797 (2d Cir. 1994), *reh'g denied* (2d Cir. 1995). These proceedings are referred to herein as "*Terry IV*."

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[5] Petitioners' November 19, 1993 Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("1993 Petition") argued that "the appropriate remedy under *Bray* requires the court of appeals to reverse its judgment and remand with instructions to the lower court to dismiss with prejudice all § 1985 claims against Petitioners." 1993 Petition at 23.

Terry V

After the Second Circuit's remand in *Terry IV*, Respondents moved in the District Court for reinstatement of the contempt sanctions, contempt-based attorneys' fees, and attorneys' fees under 42 U.S.C. § 1988. The District Court granted Respondents' motion on January 17, 1997. *New York State NOW v. Terry*, 952 F. Supp. 1033. On March 21, 1997, the District Court issued an Order reinstating contempt sanctions subject to a purge provision, awarding compensatory attorneys' fees for contempt, and awarding prevailing party attorneys' fees pursuant to 42 U.S.C. § 1988.

Petitioners appealed, arguing among other things that (1) the reinstatement of contempt fines was inconsistent with this Court's decision in *Bagwell*, (2) because there was no basis to reinstate the contempt fines, Respondents should not be awarded contempt-based attorneys' fees, and (3) the ruling in *Bray* required reversal of the award of attorneys' fees under 42 U.S.C. § 1988.

The Second Circuit rejected all of Petitioners' arguments. With respect to contempt, the Court of Appeals held that, because the District Court gave Petitioners an opportunity to purge their contempt and thereby avoid any unconditional sanctions, the contempt order complied fully with *Bagwell.* The Court of Appeals further held that, in light of Petitioners' willful violations of the District Court's injunctions, the award of contempt-based attorneys' fees was well within the District Court's discretion.

With respect to § 1988 attorneys' fees, the court held that (a) because the judgment in *Terry I* was final, Respondents' status as prevailing parties on their civil rights claims was unaffected by this Court's subsequent decision in *Bray*; (b) as prevailing parties, Respondents were presumptively entitled to attorneys' fees, unless special circumstances would make the award of attorneys' fees unjust, and (c) Petitioners had failed to show any special circumstances sufficient to overcome the presumption. In particular, the Second Circuit rejected

Petitioners' argument that *Bray* required a reversal of the attorneys' fee award, noting that, in light of the passage of FACE, 18 U.S.C. § 248 (1994) (which provided a cause of action directly comparable to the one struck down in *Bray*), there was nothing unjust about upholding the District Court's award.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION AFFIRMING THE AWARD OF PREVAILING PARTY ATTORNEYS' FEES DOES NOT CONFLICT WITH ANY PRIOR RULINGS OF THIS COURT.

The Court of Appeals' decision upholding the award of attorneys' fees under 42 U.S.C. § 1988 was entirely appropriate, and nothing in the court's ruling supports a grant of *certiorari*. The courts below properly recognized that *Bray* has no effect on the final judgment in *Terry I*. The lower courts also correctly concluded that Respondents, as prevailing parties, are presumptively entitled to attorneys' fees, unless Petitioners could show special circumstances that would render a fee award unfair. Both lower courts concluded, after a searching examination of *Bray*, and noting Congress's enactment of FACE, that because the law with respect to clinic blockades has come full circle since the time *Terry I* was decided, it would not be unfair to let the award of attorneys' fees stand. This plainly does not amount to holding Petitioners liable under a later-enacted statute; rather, it is simply a recognition that *fairness* requires consideration of *all* of the relevant circumstances. The holdings of the lower courts were correct, and should not be disturbed.

A. The Decision Does Not Conflict With This Court's Retroactivity Decisions.

The first prong of Petitioners' argument -- a thinly-disguised suggestion that the Court of Appeals should have applied *Bray* retroactively to negate the finality of *Terry I* -- is

contrary to settled law. This Court denied *certiorari* in *Terry I* in 1990, years before *Bray* was decided. Therefore, absent a grant of relief pursuant to Fed. R. Civ. P. 60(b) -- something that Petitioners have never requested -- that judgment is final for all purposes. As Justice Jackson noted in *Brown v. Allen*, 344 U.S. 443 (1953), "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata*." *Id.*, 344 U.S. at 543 (Jackson, J., concurring). Accordingly, *Bray* has no impact on *Terry I*, nor on plaintiffs' status as prevailing parties therein.

For the same reasons, *Terry I* is not subject to collateral attack in post-judgment proceedings, either in the District Court or on appeal. It cannot be disputed that the retroactive application of a new rule of law extends only to matters still pending on *direct* appeal, not to final decisions. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (new rule of law "must be given full retroactive effect in all cases *still open on direct review*") (emphasis added); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991)) (White, J., concurring).

Petitioners, however, seek to avoid these settled limits on retroactivity by arguing that *Bray* establishes a new rule with respect to the availability of prevailing party attorneys' fees under 42 U.S.C. § 1988. The Court of Appeals properly rejected this argument: "*Bray* [] did not announce a new rule of law with respect to awards of § 1988 attorneys' fees. Its new rule related to entitlement to prevail under § 1985(3)." (A 22a.) As the Court of Appeals concluded, Respondents' "entitlement to prevail" was determined long before *Bray* was decided, and therefore *Bray* is irrelevant to the question whether Respondents are prevailing parties who are presumptively entitled to a fee award.

In short, nothing in the Court of Appeals' ruling is contrary to this Court's decisions on retroactivity, and there is

simply no basis to argue that any purported inconsistency provides a basis for *certiorari* in this case.

B. The Courts Below Did Not Apply the Freedom of Access to Clinic Entrances Act Retroactively In Violation of Due Process.

Petitioners' suggestion that the Court of Appeals retroactively applied FACE to Petitioners in violation of due process is just wrong. The courts below did not hold Petitioners liable under FACE. Rather, they simply acknowledged that Congress's passage of FACE -- which was specifically intended to fill the "serious gap in Federal law" caused by the decision in *Bray*, *see* H.R. Rep. No. 306, 103rd Cong., 2d Sess., at 10 (1994) -- substantially negates Petitioners' claims that the decision in *Bray* renders the award of attorneys' fees unfair. That decision was a reasonable exercise of the lower courts' discretion, and should not be disturbed.

Both Congress and this Court have recognized that there is a presumption that successful civil rights litigants "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), *quoting* S. Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912 (internal quotations omitted). In this case, Petitioners argued that, in light of the subsequent decision in *Bray* striking down a cause of action under §1985(3) for clinic blockades, it would be unfair to award prevailing party attorneys' fees. At the same time, Petitioners argued vigorously that it would violate their constitutional rights even to take into consideration the fact that Congress, in the wake of *Bray*, created a substantially equivalent cause of action when it enacted FACE.

Petitioners cannot have it both ways. Petitioners' *liability* was established nearly ten years ago, under 42 U.S.C. § 1985(3), and the only question before the courts was the *fairness* of giving full effect to that prior judgment. As this

Court has recognized, there is nothing unfair in allowing the *res judicata* consequences of a final judgment to stand, even if "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Moreover, Petitioners, having asked the courts below to take into consideration changes in the law subsequent to the issuance of judgment in *Terry I*, can hardly complain if the courts chose to consider other subsequent developments as well, particularly when the very decision on which Petitioners rely has been effectively superseded by the statute they wish to exclude from the Court's consideration.[6] Under these circumstances, it was entirely reasonable for the Court of Appeals to conclude that Petitioners' fairness argument has been "substantially undermined" by the passage of FACE, and it would distort reality to suggest that this weighing of the equities amounts to an imposition of *ex post facto* liability. Accordingly, the lower courts' reliance on FACE provides no reason to grant *certiorari*.[7]

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[6] Ironically, Petitioners did not hesitate to rely on FACE when it suited their purpose to do so. *See* A 11a-12a (Court rejected Petitioners' argument that passage of FACE rendered case moot.)

[7] Nor does this case raise issues similar to those on review this Term in *Johnson v. Hadix*, No. 98-262, as petitioners contend (Petition at 16). The issue in dispute in *Hadix* concerns the proper interpretation of the Prison Litigation Reform Act's cap on the award of attorney's fees in civil rights litigation brought by prisoners. *See* 42 U.S.C. § 1997e(d). Specifically, review is limited to the questions of (1) whether, in litigation pending on that statute's effective date, its attorney fee provision applies to fees awarded after the statute's effective date for services rendered after that date, and (2) whether, in such litigation, this fee provision applies to fees awarded after the statute's effective date for services rendered before that date. 119 S.Ct. 508 (1998). Petitioners here do not explain how the interpretation of a specific provision of a wholly distinct statute dealing with prisoner's civil rights litigation could have any bearing on the present case.

C. The Court of Appeals Did Not Ignore the Import of This Court's Previous Remand Orders.

There is no basis to suggest that the lower courts improperly ignored any mandate from this Court. To begin with, Petitioners' argument is based on this Court's earlier remand order in *Pearson I*, and *not* on the more recent remand order in *Pearson II* directing reconsideration in light of *Bagwell*. If Petitioners' argument provided any basis for *certiorari* and reversal, this Court would already have had an opportunity to correct the alleged "mistake."

Even if *Pearson I* were still relevant, the courts below fully acquitted their obligations by carefully reviewing the issues raised by *Bray* and *Bagwell* before reinstating the award of attorneys' fees. As this Court has explained, an order granting *certiorari*, vacating the judgment, and remanding for reconsideration does "not amount to a final determination on the merits." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam). On the contrary, the very issuance of a "grant/vacate/remand" order suggests that the Court has not undertaken plenary review of the case or issue in question, and has not made a decision on the merits. *See Thomas v. American Home Prods., Inc.*, 519 U.S. 913 (1993) (Scalia, J., concurring). Even Petitioners concede that such an order does not mean "that the court on remand must find that the precedent controls the case before it." (Petition at 19.) At most, such an order is only an indication that the Court found the intervening case "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Rock Hill*, 376 U.S. 776, 777 (1964).

In light of this Court's precedent limiting the uses of "grant/vacate/remand" orders, it is spurious to suggest that such an Order amounts to a mandatory signal to reverse the decision below. To the contrary, the only direction this Court gave was to make a searching investigation to determine whether the referred case would compel a different outcome. Here, the courts below undertook just such an inquiry, and their conclusions were well-reasoned and substantially

supported by the record. Nothing more was required, and the mere fact that the lower courts chose to reinstate the judgments is no reason to grant *certiorari*.

II. THERE IS NO SPLIT BETWEEN THE CIRCUITS THAT WOULD WARRANT A GRANT OF CERTIORARI IN THIS CASE, AND THE DISTRICT COURT'S PURGE PROVISION IS COERCIVE – AND THEREFORE CIVIL – IN NATURE.

This Court should reject Petitioners' attempt to manufacture a split between the circuits with regard to the purge provision imposed by the District Court and affirmed by the Court of Appeals. There is no conflict between the decisions below and the holding of the Eleventh Circuit in *In re E.I. DuPont De Nemours & Co.*, 99 F.3d 363 (11th Cir. 1996) *cert. denied,* 118 S. Ct. 263 (1997). Rather, the purge provisions in these cases arise out of substantially different circumstances that preclude any attempt to equate the two.

The present action arose out of Petitioners' publicly announced plan to blockade abortion clinics in order to prevent women from obtaining abortions at the targeted clinics. At all relevant times, Petitioners courted public and media attention in an effort to build support for their demonstrations. Petitioners engaged in repeated, blatant violations of the District Court's orders, in the face of escalating sanctions, leading to the issuance of a permanent injunction that is still in force. Years after their initial demonstrations, Petitioners have *never* stated that they are willing to comply with the injunctions. Although Petitioners argued below that they have not violated the injunctions in years -- and, accordingly, that the case should be dismissed as moot -- those arguments were rejected out of hand, among other reasons because of Petitioners' refusal to give any assurances that they would refrain from violating the permanent injunction. (A 10a.) Because the permanent injunction requires continued compliance with its terms, and

because Petitioners do not challenge the Court of Appeals' rejection of their mootness argument, there is no basis for them to argue that "there is simply nothing to purge." (Petition at 21.)

The facts of *DuPont* make it clear that the purge provision in that case has no bearing here. *DuPont* involved allegations that the defendant provided contaminated fungicides to the plaintiffs for use in their nurseries. The case went to trial; while the jury was deliberating, the parties settled, and the case was dismissed with prejudice. *DuPont*, 99 F.3d at 365. When the plaintiffs in *DuPont* learned that DuPont had failed to produce highly relevant information in discovery, they returned to District Court and moved for sanctions. *Id.*, 99 F.3d at 366. The District Court, after a hearing, imposed more than $13 million in sanctions on DuPont, payable to the court. The district court also reinstated $1 million in conditional discovery sanctions it had imposed on DuPont during the litigation, together with an additional $100 million in sanctions for DuPont's conduct in the prior litigation and on the motion for contempt. The court provided, however, that DuPont could purge itself of these sanctions by publishing full-page ads in widely circulated newspapers "acknowledging its wrongdoing." *Id.* at 366-67.

As the Eleventh Circuit pointed out in *DuPont*, the lower court's order was neither compensatory nor coercive; rather, it was "overwhelmingly punitive" in nature. *Id.* at 368. "At the time the district court entered the contempt order, DuPont could no longer comply with the discovery orders because the [underlying] litigation had terminated." *Id.* at 369. Moreover, because the lower court's discovery orders had sought an affirmative act by DuPont – the production of relevant discovery materials – and because DuPont had apparently made the materials available by the time the District Court entered its sanctions order, *id.* at 366, there was literally nothing more that DuPont could do to comply. Finally, the lower court's order required that DuPont, in order to purge its contempt, publish ads in national and widely disseminated regional newspapers "acknowledging its wrongdoing."

There is simply no basis to compare the "purge" provision in *DuPont* with the present case. To begin with, this case involves a permanent injunction, which mandates that Petitioners refrain from blocking clinics on an ongoing basis, something that Petitioners have never agreed to do. Moreover, because the permanent injunction sought to coerce Petitioners not to blockade clinics, it is simply incorrect for Petitioners to suggest that the injunction serves no purpose. The District Court reasonably concluded that a pledge of compliance would serve a coercive purpose -- that is, that such a pledge would in fact tend to further compliance, by both the Petitioners and their supporters, with the restrictions in the permanent injunction. Nothing in the facts of *DuPont* – which, by contrast, had already been settled and dismissed by the time DuPont's violations came to light -- provides any reason to challenge the District Court's conclusion.

Finally, as the Court of Appeals noted, the lower court in *DuPont* sought to extract an "acknowledg[ment of] wrongdoing" from DuPont, whereas the District Court in this case merely sought a pledge of compliance with its orders. The distinction is critical: just as the District Court took care, at every stage of this litigation, to protect Petitioners' First Amendment rights, so the court left Petitioners free to express their views, so long as they pledge in good faith to refrain from violating the permanent injunction. Based on this distinction, the Second Circuit concluded that "the holding of *DuPont* is not pertinent" to this case. (A 18a-19a.) That conclusion is correct, and it entirely undermines Petitioners' basis for seeking a writ of *certiorari*.

In closing, the facts of *DuPont* make it clear that there is no conflict between the Eleventh Circuit's holding and the holding of the Second Circuit below. Moreover, the District Court and the Court of Appeals reasonably concluded that both the coercive monetary sanctions and the purge provision serve a coercive purpose. Petitioners have offered no valid reason to question those conclusions, and accordingly their request for a writ of *certiorari* on this point should be rejected.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

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